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RE: In Re SRBA, Case No. 39576 - Consolidated Subcase No. 92-23

Dear Counsel:

Enclosed please find Idaho Power Company's Response to Memorandum in Support of State's Motion to Dismiss Filed May 7, 2008 in the above referenced matter.

Please contact me if you have any questions. Thank you.

Sincerely,



Alison Cameron

Enclosures

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IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

IDAHO POWER COMPANY,

Plaintiff,

v.

STATE OF IDAHO; C.L. "BUTCH" OTTER,
Governor of the State of Idaho; LAWRENCE G.
WASDEN, Attorney General of the State of
Idaho; IDAHO DEPARTMENT OF WATER
RESOURCES; and DAVID TUTHILL, Director,
Idaho Department of Water Resources,

Defendants.

)
)
) Consolidated Subcase No. 92-00023
)

)
) **IDAHO POWER COMPANY'S**
) **RESPONSE TO MEMORANDUM IN**
) **SUPPORT OF STATE'S MOTION**
) **TO DISMISS FILED MAY 7, 2008**
)

Idaho Power Company ("Idaho Power"), by and through its counsel, hereby responds to the Memorandum in Support of the State of Idaho's Motion to Dismiss filed on May 7, 2008.

INTRODUCTION

The State's Motion to Dismiss seeks to take the Court down a road it need not travel in the exercise of sound judicial restraint. The State has moved to dismiss two requests for declaratory relief and one request for injunctive relief in Idaho Power's Complaint (which together actually present only two substantive questions) on the grounds that Idaho Power has failed to exhaust administrative remedies allegedly available before the Idaho Department of Water Resources ("IDWR"). The Court should deny the State's motion. The motion is based on the State's familiar yet already overruled theory that the Swan Falls Agreement has no independent legal significance. To the contrary, the State has independent obligations to Idaho Power as trustee under the contract that are independent from IDWR's legal mandates under Idaho state law governing water rights administration generally.

In addition, Idaho Power's claims relating to water rights administration were raised in conjunction with its theory that the *res* of the Swan Falls trust is water and not water rights, a position which this Court has rejected in formulating the present law of the case. Accordingly, the State's request for a ruling on possible future claims, which no longer need to be resolved under the present law of the case, seeks an advisory opinion on a non-justiciable question. In any event, any dismissal of claims for failure to exhaust or lack of jurisdiction should be without prejudice to Idaho Power's ability to raise such claims in an appropriate forum in the future. The State's argument that one of Idaho Power's requests for injunctive relief should be dismissed on the basis that it fails to state a claim for relief is inconsistent with Idaho's system of notice pleading, and also would remove an important procedural safeguard allowing Idaho Power to protect its interests in a timely manner for the duration of this litigation.

ARGUMENT

I. THE STATE HAS INDEPENDENT OBLIGATIONS AS TRUSTEE UNDER THE SWAN FALLS AGREEMENT WHICH AFFECT AVAILABLE LEGAL REMEDIES

The State's motion to dismiss is premised on the misguided assumption that Idaho Power seeks relief in this action for IDWR's violation of legal obligations imposed by Idaho state law governing water rights administration. The State is incorrect that Idaho Power must invariably proceed with lengthy review before IDWR as a prelude to judicial review of any State decision, activity or inaction which adversely affects Idaho Power's rights under the Swan Falls Agreement. In this respect, the State fails to distinguish between legal obligations of the State regarding water rights administration under Idaho state law, and duties of the State in its role as trustee pursuant to the terms of the Swan Falls Agreement.

IDWR and the Director have a number of legal duties under Idaho constitutional provisions, statutes and regulations governing water rights administration. For example, under Idaho Code § 42-231, the Director has a duty to control the appropriation and use of ground water and to protect against depletion of ground water resources. In accordance with the mandate of Idaho Const. Art. XV, § 3 that "[p]riority of appropriations shall give the better right as between those using the water," Idaho Code § 42-602 provides that the Director "shall distribute water in water districts according to the prior appropriation doctrine." IDWR and the Director also receive guidance regarding conjunctive management of ground and surface water resources in water rights administration under the conjunctive management rules. See IDAPA 37.3.11.001. As observed by the court at the outset of *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433, 437-38 (2007), IDWR promulgated the conjunctive management rules pursuant to statutory authority found in Idaho Code §§ 42-603 and 42-1805.

By contrast, the State's duties as trustee under the Swan Falls Agreement arise under the contract, and not as a separate requirement of Idaho state law. The law of this case is that the Swan Falls Agreement has independent legal effect in determining the rights and duties of the State and Idaho Power with respect to use and protection of the Swan Falls Agreement water rights. In its April 18, 2008 Memorandum Decision and Order on Cross-Motions for Summary Judgment ("Order on Summary Judgment"), the Court held that the issue of ownership "can and should be decided based on analysis of the *Swan Falls Agreement*...", and not based solely on the application of Idaho Code § 42-203B as urged by the State. Order on Summary Judgment at 22 (emphasis added). Addressing Idaho Power's position that its rights are defined by contract and the intent of the parties, and the State's opposing position that Idaho Power's rights are defined pursuant to the State's regulatory authority under § 42-203B, "this Court determined that the matter could be decided *based on contract* and the intent of the parties...." *Id.* at 46 (emphasis added).

Indeed, even the Court's analysis of the language that was later enacted as the initial version of § 42-203B was via reference to Exhibit 7B to *the Agreement*, which the Court found "clearly and unambiguously provides that any portion of Idaho Power's water rights in excess of the minimum flows are held in trust by the State, *by and through the Governor*," for the use and benefit of Idaho Power and the people of Idaho. *Id.* at 31 (emphasis added). Through this reference, the Court acknowledged the parties' determination in the Agreement that the State's duties as trustee were held by the Governor under the Agreement, and not by IDWR and the Director under Idaho state law governing water rights administration applicable to water users generally.

The Court reiterated the independent legal significance of the Swan Falls Agreement further in its summary judgment ruling:

Accordingly, to the extent there is an alleged discrepancy or ambiguity between the Agreement and the legislation, *the starting point is the Agreement*, not the legislation. While the State may still be able to enforce the terms of the statute, to the extent its provisions are alleged to vary from the terms of the Agreement it would not be able to do so without implicating *claims for breach of contract or takings*. *The resolution of breach of contract or takings claims would require an examination of the intent of the parties as evidenced by the underlying Agreement.*

Id. at 23 (emphasis added). Even the Swan Falls Agreement itself recognizes the independent significance of the Agreement's provisions vis-à-vis legislation enacted by the Idaho Legislature or administrative action taken by IDWR pursuant to its duties under Idaho state law. Referring to the Agreement's provision in Paragraph 17 that "any subsequent ... legislative enactment or administrative ruling *shall not affect the validity of the Agreement*," the Court concluded that "if the status of the State's regulatory authority changed in the future, it would not affect the status of *Idaho Power's rights as originally agreed*." *Id.* at 32 (emphasis added).

This contrast in sources of legal authority governing State activities in trust administration versus water rights administration affects legal remedies available to Idaho Power, including judicial review. The administrative hearing and judicial review procedures cited by the State as being available to Idaho Power concern IDWR's legal obligations under Idaho state law governing water rights administration in general. These procedures do not provide adequate legal remedies for Idaho Power in the event that the Governor as trustee breaches the State's trust duties and contractual obligations to Idaho Power under the Swan Falls Agreement.

The State suggests that Idaho Power can simply request a hearing before the IDWR Director under Idaho Code § 42-1701A(3) to address the claims at issue in the State's motion. However, § 42-1701A(3) provides that an aggrieved party may request a hearing before the

Director for "any *action* of the *director*, including any decision, determination, order or other action ... *required by law* to be issued by the director." (Emphasis added). First, under the Swan Falls Agreement, the State's trust duties are to be carried out "*by and through the Governor*," not the Director. See Swan Falls Agreement, Exhibit 7B (emphasis added). Second, an "action" for which a hearing may be requested under § 42-1701A(3) is one "required by law," i.e., the State's statutory water rights administration duties, not an action required by the trustee and contractual obligations of the State under a contract such as the Swan Falls Agreement. Third, breach of the Swan Falls Agreement could occur in the future through *inaction* on the part of the State in performing its trust and contractual duties, not action by the Director. Accordingly, Idaho Power could wait in vain for "receipt of written notice of the action" triggering the opportunity to request an administrative hearing under § 42-1701A(3). Because of this possibility of breach of the Swan Falls Agreement through inaction, the judicial review provisions cited by the State in Idaho Code § 42-1701A(4), which apply to "a final decision or order of the director," also are inapplicable to the Governor's trustee and contractual duties under the Agreement.

The decision in *American Falls Reservoir District No. 2* does not mandate that Idaho Power pursue a lengthy administrative process in front of IDWR before it may obtain judicial review of claims based on breach of the State's trustee and contractual duties under the Swan Falls Agreement, which are distinct from the State's statute based duties of general water rights administration. In *American Falls Reservoir District No. 2*, the Idaho Supreme Court found that agency action by IDWR in applying the statutorily-based conjunctive management rules was not subject to judicial review before administrative remedies were exhausted. 154 P.2d at 441-43. However, the court found nothing improper about immediate judicial review of the facial constitutionality of the conjunctive management rules in the relevant proceeding, illustrating that the exhaustion requirement has exceptions. In this case, where the Governor or IDWR breaches

the State's obligations as trustee under the Swan Falls Agreement, the State trustee would be acting outside of its authority, and the interests of justice would require that Idaho Power be able to obtain timely, independent review in an appropriate judicial forum. Such review is fully consistent with *American Falls Reservoir District No. 2*, where the court expressly found that exhaustion is not required prior to judicial review of agency actions falling within two judicially recognized exceptions to the exhaustion rule: when the interests of justice so require, and when an agency has acted outside of its authority. 154 P.2d at 443, citing *Regan v. Kootenai County*, 140 Idaho 721, 726, 100 P.3d 615, 619 (2004).

Idaho Power does not seek immediate judicial review from this Court of the causes of action that are the subject of the State's motion. However, should such claims or similar ones based on breach of the contractual and trustee duties established under the Swan Falls Agreement arise in the future, judicial as opposed to administrative review would be consistent with the Court's rulings in this case as well. In its initial ruling allowing Idaho Power's claims to proceed in this action, the Court recognized that the jurisdictional boundaries of the SRBA involve "gray areas." Order Granting in Part, Denying in Part Motion to Dismiss ("Order on Motion to Dismiss"), July 24, 2007, at 9. The Court observed that while provisions in an agreement or decree may arguably pertain solely to how water rights may be administered, "[t]here can be a significant amount of overlap between an administrative provision and the definition of a water right," such provisions "can also be integral to the nature and extent of the water right," and the argument that these provisions "go solely to the issue of administration and are therefore outside the scope of the jurisdiction of the SRBA oversimplifies the issue." *Id.* at 10.

Moreover, it is not always possible, when a matter is first presented to the SRBA Court, to determine whether jurisdiction for ultimate resolution of a future dispute lies with IDWR or a judicial tribunal. As the Court observed with respect to stipulated agreements and consent

decrees, "conditions change which may call into question the operation of a particular provision," in which case "[t]he procedure has not been ... to include the provision in the partial decree and require the parties to litigate its meaning administratively before IDWR." *Id.* at 10-11. The Court has also found that once the SRBA Court resolves preliminary issues involving the meaning of the Swan Falls Agreement, then "any determination on the issues of compliance and enforcement of the decree can be made by this Court or any other court or administrative body." *Id.* at 13. With respect to matters involving breach of contract in particular, the Court has stated that after the elements of a water right are determined and a partial decree issued by the SRBA Court, "any remaining causes of action (such as damages for trespass, *breach of contract*, etc.) are then transferred to a Court of appropriate jurisdiction." *Id.* at 9 (emphasis added).

As an example, with respect to one component of the State's obligations as trustee under the contract, the Court has found that judicial review may be appropriate, and indeed necessary for Idaho Power to obtain timely relief. Under Paragraph 7(B) of the Swan Falls Agreement, Idaho Power "retains the right to compel the State to take *reasonable steps* to insure the average daily flows established by this Agreement..." *See* Swan Falls Agreement, Exhibit 1 to Order on Summary Judgment. (Emphasis added). Idaho Power suggested in its Complaint one such "reasonable step" to insure flows: consideration of multiple year impacts of ground water pumping. *See* Complaint at ¶ 71. The State's obligation to take "reasonable steps" to insure the Swan Falls minimum flows is a duty imposed on the Governor as trustee by the Swan Falls Agreement, and not by statutes directing IDWR in its general water rights administration duties. In this regard, while Idaho Power's contract and trust based claims may have some relation to administration, they do not "pertain solely to the administration of water rights" and need not be addressed solely via an administrative action.

Idaho Power is entitled to enforce this and other aspects of its contractual rights, and the State's trustee obligations, in court if necessary. This Court recognized that Idaho Power may seek to enforce the "reasonable steps" provision of the Agreement by requesting immediate relief through an "appropriate motion" if flows at the Murphy Gauge do or are expected to drop below the 3,900 cfs minimum flow during the summer – which the Court found could involve a proceeding before the SRBA Court or "a district court of appropriate jurisdiction." Order on Motion to Dismiss at 13-14. The issuance of such immediate judicial relief would fall squarely within the exception to the exhaustion doctrine under which exhaustion is not required where resort to administrative procedures would be futile – as it would be were Idaho Power to require immediate compliance by the State with the Swan Falls Agreement's minimum flow and reasonable steps provisions to insure immediate flows, which could not be accomplished through a lengthy IDWR administrative proceeding. *See Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 629, 586 P.2d 1068, 1073 (agency action threatens irreparable harm).

The Court should reaffirm that the State has independent obligations to Idaho Power under the Swan Falls Agreement and trust, by and through the Governor, which are distinct from IDWR's constitutional and statutory obligations regarding water rights administration generally. Such independent obligations affect legal remedies which may be available to Idaho Power in the future depending on facts and circumstances at the time. To the extent a violation of such rights or breach of trust duties occurs in the future, Idaho Power may proceed to have its dispute resolved in an appropriate forum with jurisdiction over the particular claims – which could be the SRBA Court or an Idaho district court, and not necessarily an IDWR administrative review process

II. THE STATE'S REQUEST FOR A RULING ON POSSIBLE FUTURE CLAIMS SEEKS AN ADVISORY OPINION ON A NON-JUSTICIABLE QUESTION

Beyond reaffirming the State's independent obligations as trustee under the contract, the Court should refrain from making any ruling at the present time attempting to determine jurisdiction over claims relating to water rights administration under future facts and circumstances. Under the present law of the case, these issues present a non-justiciable question and any pronouncement by the Court would be an impermissible advisory opinion.

Idaho Power raised certain issues regarding water availability, potentially impacting water rights administration, in the context of its claims in this action that the *res* of the trust established by the Swan Falls Agreement is trust water. First, Idaho Power alleged that there was no trust water available due to the State's failure to consider delayed depletions, including those from multiple-year impacts of ground water pumping. Idaho Power further alleged that the absence of trust water was due to the State's failure to take reasonable steps in its administration of water rights to meet its obligation to insure and guarantee the Swan Falls minimum flows, in violation of the Swan Falls Settlement. *See* Complaint at ¶¶ 60-65, 71, 81.¹ Second, in light of its allegation that no trust water ever existed, Idaho Power alleged that the State should be required to reconsider prior water supply and public interest analyses when trust water permits with 20 year terms come up for renewal. *See* Complaint at ¶¶ 35-37.

However, under the Court's Order on Summary Judgment, the trust *res* is water rights and not trust water. While Idaho Power respectfully disagrees with this ruling, it accepts the ruling as the present law of the case. Accordingly, there is no present need for the Court to address Idaho Power's "water availability" based claims – including whether the State has met its obligation as trustee to take reasonable steps to insure the Swan Falls minimum flows including

¹ Idaho Power's contention in this litigation that the State is required to consider the multiple-year impacts of ground water withdrawals relates solely to the "reasonable steps" provision of the Swan Falls Agreement, and not to any independent requirement that the State may have to consider such impacts. In this respect, there is no separate issue in this litigation, beyond the Agreement's "reasonable steps" provision, regarding the legality of the State not considering multiple-year impacts of ground water withdrawals.

consideration of multiple-year impacts of ground water withdrawals, and whether the State should be compelled to reconsider water availability in renewing 20 year term permits for trust water appropriations.

The State's motion to dismiss, considered in light of Idaho Power's indication that it does not intend to pursue its claims relating to water rights administration under the present law of the case and absent future developments which may or may not occur, is essentially a request for declaratory relief seeking an advisory opinion on the non-justiciable question of future administrative or judicial jurisdiction. "As a general rule, a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). A "justiciable controversy ... must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). A judgment on a question raised in an adversary proceeding "must involve actual and existing facts," otherwise it is "advisory on questions not yet justiciable." *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, 52 P.2d 141, 144 (1935). Further, a declaration of rights is improper when based "upon a state of facts which may or may not arise in the future. Nor will future rights be determined in anticipation of an event that may never happen." 87 A.L.R. 1205 at 1215 (1933), quoted in *Utah Power and Light Co. v. Campbell*, 108 Idaho 950, 958, 703 P.2d 714, 722 (1985) (J. Bistline, dissenting).

Under these standards, a judicial pronouncement regarding jurisdiction over future claims involving whether the State has met its obligation to take "reasonable steps" to insure the Swan Falls Agreement minimum flows, and whether the State has conducted appropriate review of water availability in renewing term permits for trust water appropriations, would constitute an

advisory opinion on a non-justiciable question. What constitutes "reasonable steps" in water rights administration may vary with facts and circumstances in the future, and cannot be decided in a hypothetical or abstract context at the present time. With respect to the State's review of water availability in the 20 year term permits, if the State takes no action, or unsupported or inadequate action, Idaho Power may seek relief, but the specifics of such future action cannot be predicted now. Accordingly, the Court should not issue any ruling at the present time regarding jurisdiction over claims relating to water rights administration which might be raised under future facts and circumstances. Any such ruling at this time would be an impermissible advisory opinion on a non-justiciable question.

III. ANY DISMISSAL OF CLAIMS BASED ON FAILURE TO EXHAUST OR LACK OF JURISDICTION MUST BE WITHOUT PREJUDICE IN ANY EVENT

The State's motion to dismiss seeks to dismiss Idaho Power's claims relating to water rights administration on the basis that Idaho Power has failed to exhaust administrative remedies allegedly available to it with respect to such claims. As explained in Section I *supra*, because the claims in question concern contractual and trustee duties of the State under the Swan Falls Agreement, as opposed to general water rights administration duties of the State under Idaho state law, Idaho Power is not required to bring such claims before IDWR. However, even if the State were correct that Idaho Power is required to exhaust administrative remedies with respect to these claims, any such dismissal should be without prejudice.

The exhaustion doctrine implicates subject matter jurisdiction generally, and as such is treated as coming under I.R.C.P. 12(b)(1). *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005). A dismissal for lack of jurisdiction is without prejudice to a future action brought on the same claim, since a court without jurisdiction has no authority to issue a binding decision on the merits. *See Williams v Minn. Mining and Mfg. Co.*, 14 F.R.D. 1,

8 (S.D. Cal. 1953) ("The long-settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision on the merits, and consequently does not operate as a bar to a subsequent action before some appropriate tribunal."); Wright & Miller, *Federal Practice and Procedure (Civil 3d)* §1350 ("Inasmuch as a Rule 12(b)(1) motion is one in abatement, a dismissal is not a decision on the merits and has no res judicata effect that would prevent the reinstitution of the action in a court that has subject matter jurisdiction over the controversy.").

Idaho cases illustrate application of the general rule that a dismissal for lack of jurisdiction, including a dismissal based on failure to exhaust available administrative remedies, should be without prejudice. In *Owsley*, for example, the Idaho Supreme Court affirmed the trial court's dismissal "without prejudice" of an action for lack of subject matter jurisdiction and failure to exhaust administrative remedies in a case involving an appeal from an agency adjudication. *Owsley*, 141 Idaho at 133, 106 P.2d at 459. Similarly, in *Westway Construction, Inc. v. Idaho Transportation Dept.*, 139 Idaho 107, 73 P.3d 721 (2003), the court ordered the case remanded and dismissed "without prejudice" on the basis of failure to exhaust administrative remedies. While these cases are distinguishable on the question of whether exhaustion may be required in the future for claims pled in this case,² they are relevant in confirming that any dismissal on the State's motion to dismiss should be without prejudice.

² In *Owsley*, the Idaho Supreme Court stated that "[b]efore a court will hear an appeal from an agency adjudication, a litigant must normally exhaust the administrative remedies that agency makes available." *Owsley*, 141 Idaho at 135, 106 P.2d at 461 (emphasis added). In that case, workers' compensation lump sum settlement agreements were submitted pursuant to statute to the Idaho Industrial Commission, which rejected them. Idaho Power's claims seeking to enforce State contractual and trustee duties pursuant to the Swan Falls Agreement, and not statutory obligations regarding water rights administration generally, are distinguishable from the statutory procedure and agency adjudication at issue in *Owsley*. See Section I *supra*.

In *Westway*, the court found that the IDAPA and the exhaustion requirement applied if the matter involved a "contested case," which was one that may result in the issuance of an "order." In this case, the State may breach its obligations under the Swan Falls Agreement by inaction, and there may never be an "order" to review, particularly

Accordingly, if the Court dismisses Idaho Power's claims regarding water rights administration based on failure to exhaust administrative remedies, as urged by the State in its motion to dismiss, any such dismissal should be without prejudice. In that instance, the Court should simply dismiss the claims without prejudice to Idaho Power's right to refile in an appropriate forum in the future based on specific facts and circumstances existing at that time.³

**IV. IDAHO POWER MAY REQUEST INJUNCTIVE RELIEF BY NOTICE
PLEADING AND THEREBY PRESERVE ITS RIGHT FOR AN INJUNCTION
UPON IMPROPER ACTION BY THE STATE**

The State has also moved to dismiss, for failure to state a claim under which relief can be granted under I.R.C.P. 12(b)(6), Idaho Power's request pled in its Complaint for an injunction "enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights." The Court should reject the State's attempt to remove this request for injunctive relief from the pleadings. First, it is a properly pled general request for injunctive relief. In addition, the request provides an appropriate procedural safeguard, which could enable Idaho Power to obtain timely injunctive relief should the State take unlawful action based on its perception that it can act to the detriment of Idaho Power on the basis of the State's claimed legal title to the portion of the Swan Falls Agreement water rights subject to subordination. Finally, the State has waited until this litigation is well advanced to press for removal of this request for injunctive relief from the pleadings, and it suffers no prejudice from leaving it in the pleadings for the duration of this action.

given the State's refusal to acknowledge that it has any independent obligations under the Swan Falls Agreement as opposed to the Swan Falls implementing legislation.

³ If the Court is contemplating a dismissal of these claims with prejudice, which Idaho Power maintains would be improper, Idaho Power respectfully requests that it have the opportunity to proceed with litigation of the merits of such claims, including discovery, factual development, possible summary judgment proceedings, and a trial if necessary.

Idaho follows a system of notice pleading. *Cafferty v. Dept. of Transportation*, 144 Idaho 324, 328, 160 P.3d 763, 767 (2007). "A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief." *Id.*, citing I.R.C.P. 8(1)(a). Idaho Power's Complaint contains sufficient detail to put the State on notice as to the nature and bases of the relief requested. Other allegations in the Complaint supplement the prayer for injunctive relief by more fully alleging that:

[A] preliminary injunction enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights and asserted opinion that Idaho Power's hydropower water rights are subordinate to recharge will preserve the status quo pending a trial on the merits.

Complaint at ¶ 80.

As alleged earlier in the Complaint, the Idaho Attorney General issued Opinion 06-2, which relies on the assertion that the State holds legal title to the subject water rights to reach the erroneous conclusion that statutory law expressly making recharge water rights secondary to vested hydropower water rights is "trumped" and does not apply. *See* Complaint at ¶ 53. While the Court determined in its summary judgment ruling that it is the water rights which are held in trust by the State under the Swan Falls Agreement, the Court's order did not address the precise nature of the title interests held by the State and Idaho Power, nor did it address the impact of such title on the parties' rights and obligations under the Agreement. The question of how the relevant water rights and interests should be characterized in the SRBA decree will still need to be addressed by the parties and the Court.

The issue of whether the Swan Falls Agreement subordinated Idaho Power's water rights to use of water for aquifer recharge will be before the Court shortly pursuant to upcoming cross-motions for summary judgment. The Court has already determined that this recharge subordination issue is properly before it in this case. Should the State take unlawful action while

the issue is pending, or after the issue is decided, Idaho Power should be able to pursue its request for an injunction through its properly pled request for injunctive relief. *See In re Lloyd's American Trust Fund Litigation*, 954 F. Supp. 656, 682 (S.D.N.Y. 1997) (claim for permanent injunction should not ordinarily be dismissed at pleading stage unless underlying claim upon which relief is sought is dismissed).

If it becomes necessary for Idaho Power to seek an injunction based on acts which the State may take prior to the conclusion of this litigation, Idaho Power will file an appropriate motion for preliminary injunction which will specify the acts sought to be enjoined. *See Acuity Specialty Group, Inc. v. Paulshock*, 2006 WL 2583756 at *7 (plaintiff claiming court could consider applicable elements when injunctive relief was subsequently sought was held to state proper claim for injunctive relief). In this respect, the posture of this case is distinguishable from *Harris v. Preston-Whitney Irrigation Co.*, 92 Idaho 398, 443 P.2d 482 (1968), cited by the State in its brief. As the State observed, in *Harris* an injunction had actually been issued by the lower court, which was found to be an abuse of discretion since it "did not advise what particular acts canal owner must refrain from doing." *Id.* at 398, 442. Here, no similar vague injunction has been the subject of an order, or even a motion. If it is necessary for Idaho Power to move for a preliminary injunction in this case, it will provide further detail and specific facts to enable the Court to craft an order that is sufficiently specific as to the State acts enjoined. A motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975). Even with a dismissal for failure to state a claim, leave should be granted to amend the complaint unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962).

This case, and Idaho Power's injunction requests, have been pending for well over one year. Trial is scheduled for February 2009. The request for injunctive relief referenced in the State's motion to dismiss should remain in the pleadings governing this case until it has concluded. If the request for injunction is dismissed, it should be without prejudice to Idaho Power's ability to amend the Complaint or bring a separate action to enjoin specific State action in the future.

CONCLUSION

The Court should deny the State's motion to dismiss. In ruling on the State's motion, the Court should reaffirm that the State has independent obligations to Idaho Power under the Swan Falls Agreement contract and trust, by and through the Governor, which are distinct from IDWR's constitutional and statutory obligations regarding water rights administration generally. Exhaustion requirements do not apply to such independent rights and obligations arising under the Swan Falls Agreement. Moreover, a ruling on possible future claims which no longer need to be resolved under the present law of the case seeks an advisory opinion on a non-justiciable question. Idaho Power's claims for injunctive relief have been sufficiently pled in the Complaint given Idaho's notice pleading requirements. While Idaho Power maintains that no dismissal of claims is warranted, any dismissal through the State's motion of the claims referenced therein, whose merits have not been addressed by the Court, should be without prejudice.

Dated this 19th day of June 2008.

Dated this 19th day of June 2008.

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Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S RESPONSE TO MEMORANDUM IN SUPPORT OF STATE'S MOTION TO DISMISS FILED MAY 7, 2008** via the method indicated below, and addressed to each of the following:

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